UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

ALICE H. ALLEN, et al., **Plaintiffs,** **v.** **DAIRY FARMERS OF AMERICA, INC., DAIRY MARKETING SERVICES, LLC, and DEAN FOODS COMPANY,** **Defendants.**	**Civil Action No. 5:09-CV-00230**

REPLY MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

Bryan Davis, Reg Chaput, Rendell Tullar, John Gorton, Harold Howrigan, Jr., Louis Aragi, Jr., Clark Hinsdale III, Thomas Quint, and Clement Gervais ("Intervening Farmers"), submit this memorandum in reply to the oppositions of Plaintiffs and Dean Foods Company ("Dean") and in further support of their motion to intervene.

ARGUMENT

The oppositions to the Intervening Farmers' motion to intervene magnify the concerns about the adequacy of their representation in this litigation. First, ignoring the conflicts issue that is the centerpiece of Intervening Farmers' objection to the Proposed Settlement, the Plaintiffs (and Dean) argue that the Court should disregard the Intervening Farmers because they do not appreciate the merits of the claims and are merely puppets of DFA and DMS. This argument entirely misses the mark. Even if the allegations of the complaint were true, the Plaintiffs and their counsel fail to explain how it is not a conflict of interest to enter into a settlement agreement that, by its terms, takes sales opportunities away from one segment of the putative class and gives those sales to another segment of the putative class; nor do they explain

how there is no conflict in attempting simultaneously to represent the interests of putative class members who will bear no financial responsibility for any judgment in this case as well as those putative class who may have to bear such responsibility.

The latter group, to which Intervening Farmers belong, are in a very real sense suing themselves. Unlike a derivative action, because DFA and DMS are cooperatives, the Intervening Farmers (and other similarly situated dairy farmers) directly bear the expense of the litigation and would bear the burden of paying any judgment against DFA and DMS. Regardless of the merits of the litigation, the objections of the Intervening Farmers remain unanswered. As Mr. Davis explained, the dairy farmers are being asked to pay Plaintiffs' counsel as part of the settlement, and for the defense through their membership in the cooperatives, thus, "dairy farmers are paying both sides of the issue. Dairy farmers suing dairy farmers." Davis Dep. at 31:2-7 (Exhibit 1). By making the decision to seek to recover any judgment in this case against DFA and DMS, a judgment that will be fully borne by the farmers who ultimately own those organizations, Plaintiffs and their counsel have made it clear that they do not represent the interests of the Intervening Farmers. And if there were any doubt about that fact, it is confirmed by the terms of the Proposed Settlement, which expressly favor the interests of farmers outside of DMS over the interests of those farmers who have chosen to market their milk through that organization.

Highlighting the obvious conflict between Plaintiffs and the Intervening Farmers, Dean argues that the interests of the Intervening Farmers – as putative plaintiffs – are being represented by the defendants. *See* Dean Opp. (Doc. 216) at 5. Plaintiffs also suggest that there is no need for the Court to consider the views of the Intervening Farmers because DFA and DMS have raised similar objections to the settlement. *See* Plaintiffs' Opp. (Doc. 228) at 2. Remarkably, at the same time, Plaintiffs also argue that DFA and DMS do not have standing to

raise these objections. *See* Plaintiffs' Reply Mem. In Response To DFA/DMS's Opposition To Plaintiffs' Settlement With Dean (Doc. 229) at 13.

Second, the Plaintiffs similarly argue that the Intervening Farmers' objections to the Proposed Settlement are misguided because – despite their decades of experience – they do not understand that it will actually benefit them by increasing competition. *See* Plaintiffs' Opp. at 15. This argument does not withstand even a cursory analysis because the Intervening Farmers – as demonstrated in the detailed declarations they filed, and as two of the Intervening Farmers had an opportunity to explain at deposition (Plaintiffs did not depose the other seven) – fully understand that the Proposed Settlement does *not* increase competition among buyers of milk; it only increases competition among sellers, and specifically for the Intervening Farmers and other DFA/DMS farmers who sell to Dean. *See* Chaput Dep. at 85:19 – 87:5 (explaining that the Proposed Settlement does not create more buyers, and thus only increases competition among sellers) (Exhibit 2).

As a basic economic principle, Plaintiffs fail to advance any persuasive arguments that milk prices will improve by taking away sales from some farmers and otherwise increasing competition between neighboring farmers. One would expect that an increase in competition among *buyers* (not sellers) and expanded (not shrunken) markets could help dairy farmers, but the Proposed Settlement accomplishes no such thing. At best, the economic arguments are a matter of serious dispute, and the Intervening Farmers do not believe that it is in their interest to enter into an agreement that even *potentially* puts their milk prices and cooperative arrangements at risk. Plaintiffs must do much more than argue that the Intervening Farmers do not know for certain that this deal is unfair – they must affirmatively establish that they adequately represent the putative class members, which they do not, and that the settlement is in the economic interest of putative class members, which it is not.

In sum, the issue raised by the Proposed Settlement is not simply whether Dean is paying enough to resolve the case. The issues are more complex and go to the heart of whether the Plaintiffs and their counsel represent the interests of *all* or even most of the farmers in the proposed class, a point they simply ignore. The Proposed Settlement demonstrates that there is a fundamental dispute between the Plaintiffs and the Intervening Farmers (and likely many other farmers) about what is best for their economic interest. Contrary to the assertions of the Plaintiffs and Dean, the Intervening Farmers have demonstrated that intervention is not only appropriate, but that there is good reason to allow it now. It is the Plaintiffs and Dean who have not raised any legal or logical reason why intervention should be denied. Indeed, it seems that the only reason for opposing intervention is to prevent the Intervening Farmers from presenting an informed and comprehensive objection to the Proposed Settlement.

I. THE INTERVERNING FARMERS HAVE A PROTECTABLE INTEREST IN FULLY PARTICIPATING IN THIS PROCESS.

The Intervening Farmers have a legally protectable interest which supports intervention at this stage for two reasons. First, not only do the Intervening Farmers have an economic interest, which the Plaintiffs and Dean do not dispute, they also have a right to meaningful participation in the fairness determination with respect to the Proposed Settlement. *See, e.g., Girsh v. Jepson* 521 F.2d 153, 158 (3rd Cir. 1975) (reversing district court's approval of settlement where "the actions of the district court and [objector's] adversaries combined to deny her meaningful participation in" the fairness hearing). It is incumbent on the Court to allow the Intervening Farmers to participate in the process to the extent necessary for it to reach an informed decision on the settlement. *See, e.g., Glicken v. Bradford*, 35 F.R.D. 144, 148 (S.D.N.Y. 1964) ("While an objectant must be given leave to be heard, to examine witnesses and to submit evidence, it is within the Court's discretion to limit the proceedings to whatever is

necessary to aid it in reaching an informed, just and reasoned decision.") (citing *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942)).[1]

Second, "[i]n the class action context, absent (or unnamed) class members can intervene if the class representatives are no longer adequately representing their interests. . . ." *In re Discovery Zone Securities Litigation*, 181 F.R.D. 582, 589 (N.D. Ill. 1998). This right to intervene is not limited to any particular stage of the litigation. By negotiating the Proposed Settlement, the Plaintiffs have demonstrated that they are not representing the interests of many dairy farmers and, contrary to Plaintiffs' assertions, the Intervening Farmers are not required to stand by idly until the impact of the Proposed Settlement is felt; nor should their participation be limited to the more streamlined procedures for objecting under Rule 23.

Plaintiffs' reliance on *Lane v. Facebook, Inc.*, 2009 WL 3458198 (N.D. Cal. 2009), is misplaced. Whether rights are adequately protected is necessarily a case-by-case analysis. Simply because the court in *Lane* found that the process for submitting objections at the fairness hearing was adequate in that case does not mean that it is adequate in all cases. Indeed, other courts have permitted intervention at the preliminary approval stage. *See Cohen v. Viray*, 622 F.3d 188, 191 (2nd Cir. 2010) (noting that district court allowed intervention for the purpose of objecting to preliminary approval of the proposed settlement.); *see also Ligas v. Maram*, 2010 U.S. Dist. LEXIS 34122 *25 (N.D. Ill.) (allowing putative class members to intervene and "participat[e] in the court's consideration of the 'Joint Motion for Settlement Class Certification, Preliminary Approval of Consent Decree, and Approval of Notice Plan.'").

[1] The Plaintiffs and Dean argue that the Intervening Farmers should not be permitted to intervene because they fail to understand the terms of the Proposed Settlement and its impact. If intervention is denied, the Plaintiffs and Dean will presumably argue, again, at the fairness hearing that the Court should disregard the concerns of the Intervening Farmers as nothing more than uninformed speculation. Indeed, if intervention is denied, the Plaintiffs will certainly be correct in one respect: "The proposed intervenors will be in exactly the same position . . . ." (Opp. at 11) at the fairness hearing.

Moreover, the facts in *Lane* are very different from this case. The proposed intervenors in *Lane* were a group of plaintiffs who had filed a similar action in Texas and the principle reason for moving to intervene was to seek "an order compelling the filing of a Notice of Pendency of Other Action or Proceeding . . . with the ultimate goal of transferring this action to Texas under the 'first-filed' rule." *Id.* at *13. Thus, the court noted the "Proposed Intervenors contend it is the specific terms of the settlement that threaten to impair their rights, but the motion is based on the alleged rights that were impaired, if at all, when no Notice of Pendency of Other Action was filed at the outset of this litigation and when this action proceeded without entry of a stay or a transfer order that would give force to the first-filed rule." *Id.* *14. In other words, this was a dispute between two groups of class action plaintiffs for control of the litigation and the proposed intervenors' objections to the settlement were, at best, a secondary concern. That is not the case here.

Finally, even if the Court were to conclude that the submission of objections at the fairness hearing is technically sufficient to protect the interests of the Intervening Farmers, it should nonetheless permit intervention as a matter of discretion under Rule 24(b) and the Plaintiff and Dean have offered no reason why it should not. The Court has broad discretion in the conduct of class actions, including the authority to "protect class members and fairly conduct the action" by giving members the opportunity "to intervene and present claims or defenses, or to otherwise come into the action." Rule 23(d)(1)(B)(iii) (emphasis added). For all of the reasons discussed above, the circumstances of this litigation favor the exercise of discretion in permitting intervention at this stage in the litigation. *See United States of America, et al. v. Hooker Chemicals & Plastics Corp.*, et al., 749 F.2d 968, 983 (2nd Cir. 1984) (Rule 24 "favors 'practical considerations' to allow courts to reach pragmatic solutions to intervention problems. . . [and] is a nontechnical directive to courts that provides the flexibility necessary 'to cover the multitude of

possible intervention situations' and that requires consideration of all of the competing and relevant interests raised by an application for intervention. . . ." *Id.* (citation omitted).

This is an extraordinary case. The Plaintiffs have not only negotiated a settlement that is contrary to the interests of the Intervening Farmers, but also Plaintiffs are, in effect, suing the Intervening Farmers. To try to justify what they have done, Plaintiffs suggest that this case is no different from a derivative shareholder action against a corporation. *See* Plaintiffs' Reply Mem. In Response To DFA/DMS's Opposition To Plaintiffs' Settlement With Dean (Doc. 229) at 12, n. 14. This suggestion is wrong. First, this case is not similar to a derivative action which is an action brought by shareholders *on behalf* of a corporation. *See* Fed. R. Civ. Pro. 23.1. Nor is this case similar to a shareholder lawsuit to recover damages for securities fraud. In a securities case, the plaintiffs are not suing themselves because they are not obligated to pay the damages. Finally, even if this case could be likened to a derivative action, that does nothing to address the fundamental conflicts of interest among the putative class—in essence, these Plaintiffs and their lawyers are trying simultaneously to represent the shareholders (the farmers who are the ultimately owners of DFA and DMS) and also individuals outside of the company (the farmers who are not associated with DFA or DMS), who are seeking monetary relief from the company (DFA's and DMS's) and also to alter certain of the company's business strategies.

II. THE CONCERNS OF THE INTERVENING FARMERS ARE REAL AND WELL FOUNDED.

The Court should reject the argument that the concerns of the Intervening Farmers are too speculative to support intervention. To begin, this argument is tantamount to an improper effort to shift the burden to the Intervening Farmers to prove that the Proposed Settlement should *not* be approved. In fact, it is the burden of the Plaintiffs to prove that the settlement is fair and reasonable, and thus it is *their* burden to demonstrate that the concerns of the Intervening

Farmers are unfounded. All that Plaintiffs offer is the "anything is possible" theory in response to the concerns of the Intervening Farmers by pointing out that no one can know for certain what will happen. *See* Opp. at 14. That is not enough.

Further, the arguments that Plaintiffs make on the substance of Section 9.2 of the Proposed Settlement are not persuasive and only highlight why intervention is appropriate. Even a superficial analysis of the Plaintiffs' arguments demonstrates the division between the Plaintiffs and the Intervening Farmers and does not rebut the concerns raised. In their Reply to the opposition of DFA and DMS, Plaintiffs offer three reasons why Section 9.2 is beneficial to all dairy farmers, none of which is satisfactory. First, they suggest that Section 9.2 will result in the increased competition for the purchase of raw milk on the part of buyers. *See id.* at 16. On the surface this proposition does not make economic sense because, as explained above, Section 9.2 only increases competition between *sellers* and in so doing undoes what farmers have worked hard to accomplish - to increase their bargaining power with processors such as Dean through their participation in cooperatives. When *sellers* compete on price, the natural tendency is for lower prices, not higher prices.

Further, the fact that Dean is only obligated to *offer* to purchase milk from other sellers, at a price that it decides in its sole discretion, is highly unlikely to raise prices because Dean cannot be expected to act against its own economic interest and voluntarily pay more than it currently does. Indeed, the fact that Dean is not *required* to purchase milk from non-DFA/DMS farmers virtually assures that it will not pay higher prices. Plaintiffs also do not address the very real possibility that Dean will exploit the fact that it may be able to pay a given farmer a higher net price than what is paid from the cooperative, but because it will avoid paying balancing costs, still pay a lower price than what Dean currently pays DMS. If that were to occur, it would harm those farmers who ship their milk through DMS. *See, e.g.,* Gorton Decl. ¶ 14 (Exhibit 1 to

opening brief) (explaining the "Dean foods can pay independent farmers slightly more than the coop pays its farmers . . . Dean Foods can then used this [lower price] to force the coop to lower its over order premium.").

Second, Plaintiffs assert that this provision of the Proposed Settlement will allow farmers "to pursue a new competitive option – selling directly to Dean – should they choose to do so." Reply at 17. This is not a "competitive option" at all. As Dean points out, farmers already have the ability to sell directly to Dean. *See* Dean Opp. at 4. The reason that this is not considered by many farmers to be a "competitive option" is that a farmer dealing directly with Dean loses all of the benefits of selling through the cooperatives, such as, for example, having alternative buyers for their milk if and when Dean decides that it no longer wants to purchase from them. A farmer dealing directly with Dean must assume this risk and thus has less, not more, bargaining power because he or she must sell all of their milk everyday. *See, e.g.,* Chaput Decl. ¶ 8 (Exhibit 4 to opening brief) ("Very important to me is that by belonging to a coop I have security that we will have a market for our milk at a competitive price. When independent, I had less bargaining power for my milk.").

Third, Plaintiffs offer an alternative argument which is that Section 9.2 of the Proposed Settlement is really about forcing DFA and DMS to compete for members, which they suggest will result in DFA and DMS paying more to the Intervening Farmers for their milk. *See* Reply at 17. In support of this argument, Plaintiffs cite to the testimony of Reg Chaput who points out the basic premise that competition is generally good. *See id.* Plaintiffs do not point out that Mr. Chaput also explained that the Proposed Settlement does not increase competition for the purchase of his milk, and thus does not accomplish what Plaintiffs suggest it does. *See* Chaput Dep. At 85:19 – 87:5 (explaining that the Proposed Settlement does not create more buyers, and thus only increases competition among sellers).

The fundamental flaw with Plaintiffs' argument is that dairy farmers join cooperates such as DFA and DMS to increase their bargaining power with purchasers and for increased efficiencies that they cannot achieve on their own. To suggest that farmers will be better off to deal with Dean on their own, in competition with DFA and DMS, is contrary to the economic realities and precisely what the Intervening Farmers have sought to avoid by joining cooperatives.

CONCLUSION

For the reasons discussed above and in the Intervening Farmer's opening brief, the requirements of Rule 24 are satisfied and the Court should reject the efforts of the Plaintiffs and Dean to push members of the putative class aside and weaken their ability to object to the Proposed Settlement.

Dated at Burlington, Vermont this 25th day of March, 2011.

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B04102-00001\Doc #: 26